SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 60

DICK GREGORY, ET AL., *Petitioners,*

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, *Respondent.*

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

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1. Whether the police are justified in arresting those demonstrators who have refused to disperse and have declared their intention to continue to march when, in spite of the fact that the police have protected them for over five hours of demonstration, a threat of riot becomes imminent.
2. Whether the city of Chicago's disorderly conduct ordinance as interpreted by the Illinois Supreme Court is constitutional.
3. Whether there was error in instructing the jury of the existence of a parade ordinance when the ordinance was relevant to the proof of the city's case.

STATEMENT OF THE CASE.

On August 2, 1965, the defendant, Dick Gregory, assembled a group of eighty-five persons at Buckingham Fountain in Grant Park, downtown Chicago at 4:30 in the afternoon (R. 603). The group intended to march to City Hall, then to the home of Mayor Daley to demand that the Mayor "fire" Superintendent of Schools Benjamin Willis. The defendant Gregory addressed the marchers, telling them that they would march first to the "snakepit" [city hall] then to the "snake's house" [Mayor Daley's home] and that he expected the marchers to get arrested (R. 105-106).

After a brief demonstration in front of City Hall, the group led by Gregory marched approximately five miles to the Mayor's home (R. 106, 604). A police "task force," a city attorney and Mrs. Jean Williams, attorney for the defendants at trial, accompanied the marchers (R. 605, 612). A "task force" is an elite police unit, specially trained to handle crowds and give extra police protection. This unit was assigned specifically to protect the marchers. Gregory again spoke to the group instructing them how to behave and said he anticipated that there would be arrests (R. 612-13).

They reached the block where the Mayor's home is located about 7:50 P. M. About 25 local residents watched as the group approached (R. 107, 129, 539). Some of the local residents held signs which said, "We love our Mayor" (R. 129, 621). The area was well policed; approximately 100 officers circled the block (R. 121). Wooden barricades were placed to prevent the onlookers from approaching too closely (R. 539, 617). In addition, the taverns in the neigh-

borhood had been closed at the request of the police (R. 112).

Rather than marching in front of the Mayor's house, the group began to march around the block bounded by 35th and 36th Streets and Lowe and Union Avenues. They carried signs, chanted and sang songs characterizing Mayor Daley as a "snake" and his home as a "snake pit." The noise was so loud it could be heard all around the block (R. 267). During the period from their arrival in the area at 7:50 P. M. until 8:30 P. M. they marched around the block four times singing and chanting (R. 132, 269). On the first trip around the block some youngsters tried to fall in with the marchers. The police asked them to leave and they did (R. 107, 134).

As the marchers continued to circle the block the crowd steadily grew. At 8:30 P. M. there were approximately 500 to 600 people in the area (R. 108, 269). The police tried to keep them apart (R. 269). The number of spectators continued to increase after 8:30 P. M., though the heaviest buildup was after 9:00 P. M. (R. 300). By 9:15 P. M. the police were unable to handle the crowd (R. 300). A television camera was set up on 36th Street which flooded the intersection with lights and attracted more people into the area (R. 495, 116). The crowd of spectators broke through the police lines and out into the streets (R. 116).

By the time the marchers stopped singing, though continuing to circle the block, the onlookers had begun singing, chanting and throwing eggs and rocks at the marchers (R. 108, 137, 292, 112). Whenever the spectators attempted to cross the street they were ordered back by the police (R. 159, 284). The police also ordered the spectators to stop shouting and yelling (R. 160). Some of the police circled the block with the marchers to protect them from the crowd. The police tried to apprehend those in the crowd who were

throwing things at the marchers (R. 553). It was impossible to see who was doing this because the rocks and eggs were thrown overhead from the rear of the crowd (R. 117, 298).

On the fourth time around the block, the marchers, without warning to the police, crossed 36th Street and began marching toward 37th Street. The defendant Gregory explained that the spectators had formed their own line of march ahead of Gregory's group and when the spectators turned down 36th Street he led his group toward 37th Street "So it won't look like we are following them . . ." (R. 633). The police, taken by surprise at the marchers' change of route, ran to keep up with them (R. 548). As the marchers crossed 36th Street, they walked directly into a large group of spectators (R. 108-109). The marchers had to wait while the police cleared a path for them (R. 549, 632, 635). On the corner of 37th and Lowe the march was again impeded when the marchers encountered a group of people on the sidewalk who were attending a funeral (R. 634).

After circling the block between 36th and 37th Streets the marchers headed back toward 36th Street and circled that block twice more. There were more than 1,000 people in the area (R. 115, 108, 162-63, 194, 277). The crowd was extremely agitated and was shouting "Let's get them" (R. 277). The police commander ordered the additional available officers into the area (R. 301). Shortly after 9:00 P. M. Commander Pierson spoke to Gregory. He explained that the hour was late, the situation was becoming increasingly dangerous and that when the marchers turned east on 35th Street they should cooperate to prevent a disorder by marching out of the area (R. 551, 114). Gregory refused (R. 551, 407). The marchers circled the block once more (R. 552).

When they reached 35th Street again Commander Pierson approached Gregory. He asked him to lead the marchers out of the area because of the near riot conditions (R. 552). It was aproximately 9:25 P. M. Twelve to fourteen hundred people were congregated on 35th Street between Union and Lowe. Almost all available police were concentrated on that street (R. 553-54). Gregory said that they would not leave (R. 552, 638).

Gregory said, "I walked back to the back of the line and explained to each of the marchers the conversation that had gone on ahead with Commander Pierson and myself. I explained to them that we were within our Constitutional rights and that if anything was said or if anything happened for no one to worry because we would decide up front what course of action would be taken, regardless of anything that happened. This was passed on, and I told each and every one of them personally, 'don't worry about anything, don't break the line.' and I came back up front and we continued to march. . ." (R. 641). Gregory ordered the marchers explicitly, "We are not going to leave. We will remain here. Let them arrest us" (R. 118, 407).

Commander Pierson told the marchers that if any of them wanted to leave they would be escorted out of the area. Three or four persons left (R. 553).

After repeated requests for the marchers to leave, Commander Pierson ordered their arrest (R. 568-569). The marchers, both black and white, were arrested (R. 659-660). They were charged with two counts of disorderly conduct and tried and convicted by a jury (R. 802-806). The Supreme Court of Illinois affirmed the trial court judgment. *Chicago* v. *Gregory,* 39 Ill. 2d 47, 233 N. E. 2d 422 (1968).

SUMMARY OF ARGUMENT.

I.

Petitioners' freedoms of speech and assembly were not restrained by respondent. To the contrary, the Chicago Police Department fully protected petitioners' demonstration, despite (1) the unpopularity of petitioners' cause, (2) their egregious and inappropriate choice of forum to present that cause, (3) the dubious societal value of their "ideas" and (4) the disturbance caused by petitioners to the tranquility of the residents of Mayor Daley's neighborhood. Petitioners' attorney referred to this police action as "protecting the demonstrators" (R. 128). Indeed, the record shows that the police marched with petitioners for five and one-half hours in order to make certain that there was absolutely no interference with their constitutional freedoms—and that for one and one-half hours at the terminus and object of their march, the home and neighborhood of Mayor Richard J. Daley, petitioners were able to express their "ideas", directly and symbolically, by singing, chanting, clapping, stomping, and by the carrying of signs reading "Snake Daley", "Snake's house", etc.

Petitioners' proposition that this demonstration was terminated because of a so-called "heckler's veto" adds more rhetoric than light to the issues herein. "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature. See Douds, 339 U. S. at 397, 94 L. Ed. 942, 70 S. Ct. 674. To those who

would paralyze our Government in the face of impending threat by encasing it in a semantic straightjacket we must reply that all concepts are relative." *Dennis* v. *United States,* 341 U. S. 494 (1951), at 508.

Freedom of speech and assembly are not absolute rights. Both may be limited in a reasonable manner when clear and present danger of disorder becomes an immediate threat. Petitioners were arrested only after: (1) The peace and privacy of the neighborhood residents were completely disrupted by petitioners' raucous behavior and the possibility of violence and riot became a virtual certainty; (2) The police had made all reasonable efforts to control the ever-increasing crowd of spectators; (3) The police on several occasions had informed petitioners of the dangerous conditions and had asked them to cooperate by leaving the area. "[T]he officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and . . . there was no evidence . . . that the acts of the police were a cover for the suppression of petitioner's views and opinions." *Feiner* v. *New York,* 340 U. S. (1951), at 319.

II.

The disorderly conduct ordinance of the City of Chicago has been narrowly interpreted in a series of cases before the Illinois Supreme Court in a manner which removes any doubt as to its constitutionality. That court held that in the instant cause all of the necessary elements of disorderly conduct were present and for that reason affirmed the trial court judgment. *Chicago* v. *Gregory,* 39 Ill. 2d 47, 60, 233 N. E. 2d 422 (1968). This Court has held that the construction placed on a statute by the highest State court will be binding on this Court. *Winters* v. *New York,* 333 U. S. 507 (1947).

III.

The jury instruction as to the existence of an ordinance requiring a parade permit was not misleading and was necessary to clarify references to a parade permit both in the testimony and in the remarks of petitioners' counsel. Moreover, the Illinois Supreme Court, after carefully examining the record, determined that the instruction was not prejudicial.

ARGUMENT.

I.

WHEN THERE IS AN IMMINENT THREAT OF VIOLENCE AND THE POLICE HAVE DONE EVERYTHING POSSIBLE TO PROTECT THE DEMONSTRATORS AND CONTROL THE CROWD, THE POLICE ARE JUSTIFIED IN ARRESTING THOSE DEMONSTRATORS WHO HAVE TWICE REFUSED TO DISPERSE AND HAVE DECLARED THEIR INTENTION TO CONTINUE TO MARCH.

The petitioners rest their argument on the proposition that if the conduct of demonstrators is not violent, their demonstration is, as a matter of law, constitutionally protected. This proposition is both overly simplified and wholly inaccurate. The conduct of the participants in a demonstration is only one of many factors which weighed together determine constitutional protection. Other factors which must be assessed are (1) the precise form of the demonstrators' conduct; (2) the type of forum chosen to air their views; (3) the availability of alternative forums; (4) the resulting infringement of the constitutional rights of others and, (5) above all else, the possibility of violence which degenerates and ultimately destroys the subject society. In connection with this last factor, the availability of police to maintain order and protect the exercise of constitutional freedoms is crucial. Notable for its absence from the list of relevant considerations is any evaluation of the merit of the demonstrator's message.

"Speech, including symbolic speech such as picketing, never exists in limbo. It always occurs in a particular place and in particular circumstances. Even if *what is said* does not create a 'clear and present danger' of physical injury to others, the place where the speech is uttered, the size of the crowd, and the circumstances may convert

the lawful into the unlawful". Mr. Justice Fortas, Concerning Dissent and Civil Disobedience, at 13.

A. Civil Liberties Such as Free Speech Presuppose an Orderly Society.

From the long line of First Amendment cases before this Court, certain principles of law have clearly emerged. Picketing, demonstrating and marching, though forms of action or conduct, are accorded some degree of First Amendment protection because they are mingled with speech. Because of the states' interest in regulating conduct in order to stabilize society and because they are not pure forms of speech, such activities are not accorded the full panoply of First Amendment protection. This Court stated the principle in *Cox* v. *Louisiana,* 379 U. S. 536 (1965), at 555:

> "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these Amendments afford to those who communicate ideas by pure speech. See the discussion and cases cited in No. 49, post at 563. We reaffirm the statement of the Court in *Geboney* v. *Empire Storage and Ice Co.,* 336 U. S. 490, at 502, that it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written or printed."

The exercise of any civil liberty presupposes the existence of an ordered society. Thus, activities protected by the First Amendment are not merely balanced off against the necessity of maintaining an ordered and stable society. The need to preserve an ordered forum for the expression and acceptance of ideas must preponderate over the exer-

cise of First Amendment liberties in isolated instances. Again in *Cox* v. *Louisiana,* 379 U. S. 536 (1965), this Court indicated the precedence which must be given to maintaining order:

> "From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." (*Id.* at 554.)

In the present case, as a direct result of petitioners' conduct, the tranquillity and order of a residential community were disrupted. The situation was only moments removed from a riot. Yet the petitioners contend that their actions were constitutionally immune from any police effort to lessen the dangerous tensions of the situation. They claim the right to continue, unhampered, the same course of action which had created the near riotous conditions. Their claim of constitutional protection is predicated upon a refusal to recognize the cause and effect relationship between their march and the impending riot of a crowd numbering more than one thousand.

The words of this Court in *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940) are appropriate here:

> "The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and

present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace or order, appears, the power of the State to prevent or punish is obvious." (*Id.* at 308.)

No group can demand that society pay such a price in violence and disorder so that members of that group may have unfettered liberty to speak their views when and where they choose.

B. The Nature of the Forum Chosen Limits the Constitutional Protection Accorded a Demonstration.

This Court has always recognized the significance of the site of a demonstration in determining constitutional protection. In *Cox* v. *Louisiana,* 379 U. S. 536 (1965), this Court indicated that a State's vital interest in preserving the integrity of its judicial system made demonstrations or protests outside of a courthouse building wholly inappropriate. Regardless of how symbolic that building may be or how effectively or poignantly a point could be made by demonstrating there, a courthouse is unacceptable as the site of a protest demonstration.

Likewise, in *Adderley* v. *Florida,* 385 U. S. 39 (1966), this Court affirmed a conviction for trespass resulting from a demonstration at the county jail. Certainly that property belonged to the State and was in that sense public property, but the use to which it was committed made it wholly inappropriate as the site of a demonstration. The Court affirmed the right of a State to deny access to public property for demonstrations:

"The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the

> property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate . . . ' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on *Cox* v. *Louisiana*, supra, at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." (*Id.* at 47-48.)

In other decisions, this Court has commended the choice of a particular place for a demonstration. In *Edwards* v. *South Carolina*, 372 U. S. 229 (1962), demonstrators marched to the State House grounds to protest discrimination. The Court noted that because this was the seat of government it was an appropriate place to seek redress of grievances against the State. In addition, the grounds were open to the public and citizens from all over the State continually visited there, whether to lodge a complaint or just observe the processes of government.

It is not merely whether land is publicly owned or privately owned that determines whether it is a permissible place for a demonstration. Rather, the test is whether the use to which the property is commonly put or lawfully restricted is consistent with conducting a demonstration there. There are public sidewalks and streets surrounding all types of property, public and private, accessible and restricted. It does not follow that those streets and sidewalks are automatically available to groups who wish to march or demonstrate regardless of the character of the property they surround.

In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), this Court

upheld the homeowner's right of privacy. In that case magazine solicitors went from door to door in a residential area trying to interest the residents in their publication. The solicitors claimed First Amendment protection because literature was involved. This Court viewed the problem as ". . . a balancing of the conveniences between some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." (*Id.* at 644.) This Court upheld the validity of an ordinance forbidding such invasions of the homeowners' privacy.

In *Marsh* v. *Alabama,* 326 U. S. 501 (1946), it was undisputed that the entire town was privately owned. However, this Court reversed a trespass conviction which resulted when a Jehovah's Witness attempted to distribute religious literature on a street adjoining a business block of the town. The streets of that town in the business area were frequented by the public generally and not restricted to residents of the town. A public highway ran thirty feet parallel to the business block bringing travellers from other towns to shop there. It would have been inconsistent to exclude any one group from those streets because all persons, regardless of whether they lived there were invited to come and shop there.

To the same effect is the recent decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza,* ..... U. S. ....., 88 S. Ct. 1601 (1968). In that case the petitioners had been enjoined by the Pennsylvania Courts from picketing in front of a supermarket in a shopping center. This Court held that the mere fact that respondents held title to the property did not justify excluding the pickets from an area normally accessible to the public.

> "All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area

> and those passing through,' *Marsh* v. *Alabama*, 326 U. S. at 508, 66 S. Ct. at 279, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.
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> • • • • •
>
> "The sole justification offered for the substantial interference with the effectiveness of petitioners' exercise of their First Amendment rights to promulgate their views through handbilling and picketing is respondents' claimed absolute right under State law to prohibit any use of their property by others without their consent. However unlike a situation involving a person's home, no meaningful claim to protection of a right or privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim to protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue." (*Id.* at 1609-1611.)

This principle has also been followed by the Court of Appeals for the Second Circuit in *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (2d Cir. 1968). The Court upheld the protestors' rights to distribute literature in the Port Authority Bus Terminal because the Terminal was dedicated to public use (*id.* at 88).

The rationale of the foregoing cases requires that the decision in the case at bar be affirmed. The site chosen for the demonstration was a residential neighborhood on the South side of Chicago. By no stretch of imagination could it be characterized as a place dedicated to the airing of public issues as in *Edwards* v. *South Carolina*, 372 U. S. 229 (1962). Neither is it an area which is frequented by the public generally because of the presence of large commercial areas as in *Marsh* v. *Alabama*, 362 U. S. 501 (1946) and *Amalgamated Food Employees Union* v. *Logan Valley*

Plaza; ..... U. S. ....., 88 S. Ct. 1601 (1968). Rather, it was an area of small homes, wholly inappropriate as the site of a large protest march. The peace and privacy of the residents were completely disrupted. Because the neighborhood people were not accustomed to such bizarre occurrences, the possibility of violence and mass riot became a virtual certainty. The area was neither appropriate nor customary as the site of a protest march.

The focal point of the demonstration was supposedly the home of the Mayor. However, no attempt was made to single out his house or confine the march to the area in front of it. There is no evidence in the record that the marchers even knew whether he was at home. The sole aim of the marchers was to make their presence in the neighborhood felt. The incident set out in our Statement of Facts. Wherein the marchers deviated from the path they had been following and began circling the area one block south illustrates their real purpose (R. 633). The marchers ceased marching around the block where the Mayor's home was located because they did not want it to look as if they were following the other group of marchers that had formed in front of them. It was irrelevant to them what block they were marching around as long as they made their presence in the area felt. It was irrelevant to them whether the Mayor knew why they were there, or even if they were there. It was the attention of the neighboring residents that they tried to attract. In this they succeeded. They also made a calculated effort to disturb and agitate the neighborhood residents. Again, they succeeded.

The march was to demand the discharge of Superintendent Benjamin Willis. If the Mayor was the appropriate person to lodge this complaint with, and if his home was the only place where a meeting with him could be held, and if they confined themselves to attracting his attention, a

march to his home might be seen as a reasonable course of action. In the absence of any alternative, perhaps the privacy of a government official's home may be sacrificed for a sufficiently serious grievance which requires immediate attention. But see Kamin, *Residential Picketing and the First Amendment,* 61 N. U. L. Rev. 177 (1966). However, none of these factors are present in the case at bar. Indeed, appropriate alternatives to a march on the Mayor's home existed, one being a demonstration at City Hall. City Hall is not new to protest marchers and demonstrations. Neither is the new Chicago Civic Center and its plaza, adjacent to City Hall. Groups frequently have demonstrated at the offices of the Chicago Board of Education in downtown Chicago. The petitioners might have brought their complaint to the school board officials at this building. This would have been particularly fitting since only the Chicago Board of Education, and not the Mayor, may hire and fire the Superintendent of Schools (the supposed object of Petitioners' protest). Ill. Rev. Stat. 1965, ch. 122, § 34-13. Moreover, this official is accountable only to the Board of Education, but not to the Mayor. There is no claim that these logical choices were foreclosed to them. There is no pretense that, in spite of his lack of legal authority to fire the Superintendent, the Mayor would not meet with petitioners and hear this complaint. In fact, the petitioners began their march from Buckingham Fountain in Grant Park and proceeded to City Hall (R. 604), then proceeded to the Mayor's home. There is no evidence in the record why this second part of the march was thought necessary or appropriate. It is difficult even to conjure up a possible justification. This second course of action can only be deemed a wholly unreasonable abuse of the freedom to speak and seek redress of grievances.

In their brief the petitioners have characterized the reaction of the neighborhood as a "heckler's veto." While it is probable that some of the neighbors read the marchers'

signs and disagreed with them (particularly, the characterization of their neighbor and Mayor as a "snake"), it is altogether more likely that the real outrage of the neighborhood people resulted from petitioners' calculated and hostile disruption of their privacy. It was as obvious to the neighborhood residents, as it must be to this Court, that the sole purpose of the march was to disrupt the everyday activities of the neighborhood people by marching eighty-five demonstrators through the area in military formation, alternatingly singing and chanting and then in dead silence.

This is not the exercise of civil liberties. This is harassment perpetrated with attempted impunity under the banner of free speech. The petitioners attempt to deceive this Court by relating that it was a hostile ideological response that they encountered. The remarks of the spectators in the record show that their reaction was only one of justifiable aggravation at the futile and unreasonable conduct of the marchers. Indeed, if any liberties were infringed upon, it was those of the residents. Streets were barricaded; taverns were closed; television camera lights flooded the intersection at 36th and Union; one hundred police officers swamped the area restricting the free movement of the local people. No doubt many of the residents did not understand what all this was for and feared violence to themselves, their families and their homes.

But in spite of the disturbance to the neighborhood residents, it was only when the huge crowd of spectators was on the verge of rioting that the police acted. Even then, they first requested the petitioners several times without success to cooperate in preventing a riot by leaving the area. It was only when the petitioners defiantly refused to leave, insisted through their leader Gregory that they would remain and invited arrest that the police reluctantly arrested them.

The petitioners base their case on the fact that sidewalks are public property, as if by adhering to a narrow line of march, they were infringing the liberty of the neighborhood people or invading their privacy anytheless. However, as this Court has held in *Cox* v. *Louisiana*, 379 U. S. 536 (1965) and *Adderley* v. *Florida*, 385 U. S. 39 (1966), the fact that property is publicly owned is not determinative. The test of First Amendment protection is whether the site chosen for a demonstration is appropriate given the use to which the place is ordinarily put. Only if no alternative site exists may this test of reasonableness be suspended or the privilege of free speech will be converted into a weapon of harassment and invasion of the privacy of others. In the present case appropriate and logical alternatives existed and were easily accessible. The conduct of the demonstrators, under the banner of free speech, was an unconstitutional harassment and infringement of the privacy of others.

State courts have consistently rejected demonstrators' claims that the Constitution protects residential picketing. In a series of cases, the Minnesota Supreme Court has held that an individual's right to peace and privacy in his home overrides any claim of constitutional immunity by residential picketers. In *State* v. *Zanker*, 179 Minn. 355, 229 N. W. 311 (1930), two striking employees picketed the home of a non-striking employee. The Court upheld their convictions for disorderly conduct:

> "They did not solicit an opportunity to talk to her and persuade her by peaceful means. Their conduct discloses a studied plan which carried with it an attitude of hostility. They disregarded her right to be undisturbed. They resorted to offensive means. Their conduct necessarily carried some degree of humiliation and insult; it naturally tended to provoke resentment not only on the part of Norma Christensen and her family but also among the neighbors. It was an annoy-

ance; it tended to disturb the immediate community . . ." (*Id.* at 356.)

See also *State* v. *Perry,* 196 Minn. 481, 265 N. W. 302 (1936); *State* v. *Cooper,* 205 Minn. 333, 285 N. W. 903 (1939). Though these cases involved labor disputes they cannot be distinguished on that ground. Constitutional protection does not depend upon the substance of the demonstrators' complaint. The type of cause they represent is irrelevant to the lawfulness of demonstrators' conduct.

At present ten States including Illinois have statutes prohibiting residential picketing (Colorado, Connecticut, Florida, Hawaii, Illinois, Kansas, Michigan, Nebraska, Utah and Wisconsin).

In his scholarly article, *Residential Picketing and the First Amendment,* 61 N. U. L. Rev. 177 (1966), Professor Kamin offers compelling reasons why residential picketing should be declared beyond the limits of constitutional protection:

> "But the case against residential picketing of public officers is so firmly based that reliance on Supreme Court dicta and legal analogies is unnecessary. The very concept of representative government renders odious and illegal such a stratagem of political agitation. All demonstrations at the homes of public officials will, of necessity, affect neighbors who are strangers to the political controversy. Does assumption of public office by a householder terminate the right of privacy for him, his family and neighbors? The question has a pervasive significance in a democratic society. If losing the last redoubt of privacy and repose, if subjecting one's family and neighbors to the constant harassment of sidewalk demonstrations is the price of holding public office, then the republic shall have lost the services of its ablest citizens."
>
> • • • • •
>
> "To subject a public official to the pressures of home picketing conflicts with basic democratic tenets. Our

political ideals contemplate that our elected officers should make rational decisions in large part on their reading of the public will. To permit the airing of grievances by citizens as a manifestation of part of the public will, protection is constitutionally afforded to the presentation of petitions to governments. Residential picketing is neither a primary nor a conventional way of communicating the existence of a grievance to a public officer. Rather, it is an instrument for achieving political results by oppressing and harassing the official and his family.

Petitions for redress of grievances are communications directed to the place of government in person, by mail, by telephone or even by demonstrations in view of public office buildings. Having utilized such methods, when a group resorts to residential picketing, it introduces a note of physical intimidation and coercion which is as foreign to our notions of proper public decision-making as bribery, blackmail or overt physical coercion. If public decisions are to be made in this way, the group which can bring the greatest amount of physical power to bear upon officials will see its views prevail. A government somewhere might function in this way—but it would not be a democracy." (*Id.* at 228-231.)

However, in the present case, the petitioners were not arrested because they were demonstrating in a residential area. They were arrested solely because it was the only course available to the police given a crowd of over one thousand persons on the verge of a riot and the petitioners' refusal to leave the area and the petitioners' intention, twice declared, to continue marching. Though there are compelling reasons for holding that the sole fact of a demonstration in a residential area is sufficient for a conviction for disorderly conduct, in the present case it is only one of several factors necessitating the arrest and conviction of the defendants. In its opinion the Illinois Supreme Court recognized the cogent reasons for holding that resi-

dential picketing *per se* constituted disorderly conduct but the Court did not affirm on that basis. The Court found that the police had protected the marchers from 4:00 P. M. until 9:30 P. M., making all possible efforts to allow the demonstration to continue; that after 9:00 P. M. the crowd had become unmanageable and given this clear and present danger of violence the police had no alternative but to arrest the demonstrators.

C. A Clear and Present Danger of Violence Requires That a Demonstration Cease.

In addition to a consideration of the appropriateness of the location chosen and infringement of the rights of others, constitutional protection automatically terminates when there is a clear and present threat of violence. In order to be useful to society this principle requires that police exercise limited discretion to determine when such a threat of violence exists. In *Feiner* v. *New York,* 340 U. S. 315 (1951), this Court held that policemen need not await the outbreak of violence to confirm their fears. Mr. Justice Frankfurter, in his concurring opinion in *Niemotko* v. *Maryland,* 340 U. S. 273 (1951), stated:

> "As was said in *Hague* v. *C. I. O.,* 304 U. S. 496 *supra,* uncontrolled official suppression of the speaker 'cannot be made a substitute for the duty to maintain order' 307 U. S. at 516. When conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity. . . . It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker." (*Id.* at 288.)

The petitioners' reliance on *Cox* v. *Louisiana,* 379 U. S. 536 (1965); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Garner* v. *Louisiana,* 368 U. S. 157 (1961); and *Henry* v. *City of Rock Hill,* 376 U. S. 776 (1963) is inappropriate. In all of these cases the decision turned on the fact that there was no evidence of any threat of violence. In *Cox* v. *Louisiana,* 379 U. S. 536, the Court said:

> "There is no indication that any member of the white group threatened violence. And this small crowd, estimated at between 100 and 300 was separated from the students by '75 to 80 armed policemen,' including 'every available shift of the City Police, the Sheriff's office in full complement, and additional help from the State Police,' along with a 'fire truck and the Fire Department.' As Inspector Trigg testified they could have handled the crowd." (*Id.* at 550.)

In *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), this Court distinguished the *Feiner* case on the ground that there was no evidence of violence in the record:

> "There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was 'ample.'
>
> "This, therefore, was a far cry from the situation in *Feiner* v. *New York,* 340 U. S. 315, where two policemen were faced with a crowd which was 'pushing, shoving and milling around' (*id.* at 317), where at least one member of the crowd 'threatened violence if the police did not act,' *id.,* at 317, where 'the crowd was pressing closer around petitioner and the officer,' *id.,* at 318 . . ." (*id.* at 236).

In *Henry* v. *City of Rock Hill,* 376 U. S. 776 (1963), this Court found that *Edwards* v. *South Carolina, supra,* required reversal because there was no evidence of violence:

> "They assembled in a peaceful, orderly fashion in front of the City Hall to protest segregation. They carried signs to that effect and they sang patriotic and

> religious songs. Although white onlookers assembled, no violence or threat of violence occurred and traffic was not disturbed. After 15 minutes of this, they were arrested for failure to disperse upon orders." (*Id.* at 777.)

Likewise *Garner* v. *Louisiana,* 368 U. S. 157 (1961) involved a peaceful sit-in at a lunch counter which was terminated by the police without any incident of violence to justify the arrest.

The record in the present case contains constant reiterations of the danger of the situation. First the sheer size of the crowd, which was estimated at 4000 by one officer (R. 491) and certainly exceeded 1000 (R. 115, 162-63, 277, 553), must be considered inherently dangerous. The record indicates that about 9:00 P. M. because of the rapid growth of the crowd the police were no longer able to maintain order (R. 300). A call was sent out for any additional officers that were available in an effort to keep control (R. 301).

The crowd was extremely agitated. They were hurling rocks at the marchers. The shouts from the crowd were worse than those which confronted the police in *Feiner* v. *New York,* 340 U. S. 315 (1951). There, a single person in the crowd told police that, if they didn't stop the speaker, he would. Here, not only was the crowd larger than that present in the *Feiner* case but many people were shouting "Let's get them" and attempting to break through the police lines (R. 277-78). The situation could have turned into a bloody riot in an instant. It is remarkable that the police attempted to maintain order as long (and as effectively) as they did. The situation was deemed to be uncontrollable at 9:00 P. M. The police then asked the demonstrators to cooperate in preventing a riot by marching out of the area, but they did not arrest them when they refused. The demonstrators were allowed to continue

marching. They were asked to leave again; again refused; again declared their intention to continue marching. Finally, at 9:30 P.M. the demonstrators were arrested. There was no longer an alternative. To allow the march to continue a moment longer would have been an invitation to a riot. In this connection the excerpt from an article reproduced on pp. 17-18 of the Appellant's Brief requires comment. The author contends that the potential danger of the situation stems not from the numbers present but from the interaction of audience and demonstrators.

"There is nothing *inherently* coercive about one dissenter, or one hundred, or one thousand, walking peaceably down a street or gathering to sing in front of a building." (Appellants' Brief at 17-18.) This is meaningless oratory. The potential danger of the situation stems from the numbers present, both demonstrators and spectators. Actual violence may erupt from the interaction of the two groups. It cannot be contended that there is no difference between protecting one demonstrator as opposed to one thousand demonstrators or controlling one spectator as opposed to a crowd of one thousand. The author also suggests that danger would be avoided if the audience would content itself to stay at home and ignore the demonstrators. It should be noted that in the instant cause the audience was a "captive" one in that it resided in the area of demonstration and could not effectively insulate itself from the noise and turmoil wrought by petitioners. But the function of free speech is to provoke constructive thought and action. It would not be a desire for peace but only apathy that would let the public ignore a demonstration in its midst. The petitioners have done violence to the author's thesis in excerpting this single ludicrous passage from the entire text.

D. Police Made Every Effort to Protect the Marchers and Control the Crowd. At the Point of Riot, When Some Marchers Refused to Leave and Declared Their Intention to Continue to March, There Was No Alternative But Arrest.

Up to the time of arrest, the police had done everything possible to assist the marchers. As is set out in the statement of facts, the police erected wooden barricades to contain the spectators (R. 539); they tried to keep the crowd atomized in small segments to prevent mass action (R. 269); they dispersed the spectators each time they tried to form their own line of march (R. 107, 134, 623, 632); they ordered the spectators back when they tried to cross the streets (R. 159); they ordered the spectators to stop shouting (R. 160). The record is replete with evidence that the police made every effort to protect the demonstrators and control the crowd (R. 102, 110, 111, 164, 298, 491). At their trial even the petitioners' attorney, who was present during the demonstration, admitted that the police protected the demonstrators (R. 128). After all these efforts failed the police were reluctant to arrest the demonstrators. They offered to escort any of the marchers out of the area who wished to leave. Three or four people accepted the offer and were allowed to leave without being arrested (R. 119).

The defendants make much of the fact that none of the people in the crowd who were throwing things were arrested. Commander Pierson did order the officers to arrest the rock throwers (R. 553). However, the objects were being thrown overhead from the back of the crowd making it impossible to tell who was throwing them (R. 298). In addition, the limited number of police compared with the size of the crowd made it impossible to devote officers to the task of seeking out those few individuals who were re-

sponsible for throwing things when the control of the crowd as a whole was an increasingly difficult task. Mr. Justice Frankfurter, in his concurring opinion in *Niemotko* v. *Maryland*, 340 U. S. 273 (1951), aptly noted:

> "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size and temper, and not against the speaker." (*Id.* at 289.)

In their brief, the petitioners attempt to unfairly discredit the conduct of the police and prejudice the issues before this Court. Apparently, since the record is replete with evidence proving that the police did everything possible to protect the demonstrators and control the crowd, petitioners have included in their brief a newspaper editorial complaining about the conduct of other police officers at an unrelated incident which occurred two and one-half years subsequent to the instant demonstration (Appellant's Brief at pp. 16-17).

By this tactic, petitioners seemingly hope to impeach the uncontroverted testimony of the trial witnesses and to persuade this Court to disregard the facts found by the jury based upon that testimony. The petitioners' modus appears to be that since the record in the case clearly supports the convictions, perhaps doubt can be raised by the incorporation of irrelevant material.

The uncontroverted record shows that the police did everything possible to protect the demonstrators and assist their march. They waited until the last possible moment to terminate the demonstration, when their repeated requests for dispersal had been refused and there was a great danger that violence would erupt at any moment. The guilty verdict returned by the jury is clearly supported by the evidence in the record and the convictions of the petitioners must be affirmed.

II.

CHICAGO'S DISORDERLY CONDUCT ORDINANCE AS INTERPRETED BY THE ILLINOIS SUPREME COURT IS CONSTITUTIONAL.

The interpretation which the highest State court places on a statute is as binding on this Court as if those very words were written into the State law. This principle was set out in *Winters* v. *New York*, 333 U. S. 507 (1947):

> "The interpretation by the Court of Appeals puts these words in the statute as definitely as if it had been so amended by the legislature. *Hubert* v. *Louisiana*, 272 U. S. 312; *Skiriotes* v. *Florida*, 313 U. S. 69, 79. We assume that the defendant, at the time he acted, was chargeable with knowledge of the scope of subsequent interpretation." (*Id.* at 514-515.)

The disorderly conduct ordinance of the City of Chicago has been before the Illinois Supreme Court in a series of cases. An examination of these cases reveals that a narrow interpretation has been placed upon that ordinance excluding from its scope activities protected by the First Amendment.

In the present case, the Illinois Supreme Court considered the defendants' claim that the ordinance was unconstitutional, holding (*Chicago* v. *Gregory*, 39 Ill. 2d 47, 233 N. E. 2d 422 (1968)):

> "Defendants also argue that the disorderly conduct ordinance of the city is unconstitutionally vague as applied to free expression and free assembly. We interpret the ordinance as authorizing the action taken by police under the circumstances disclosed by this record. (See *City of Chicago* v. *Williams*, 45 Ill. App. 2d 327.) It does not authorize the police to stop a peaceful demonstration merely because a hostile crowd may not agree with the views of the demonstrators. It is only where there is an imminent threat of violence, the police have made all reasonable efforts to protect the demonstrators, the police have requested that the demonstration be stopped and explained the request, if

there be time, and there is a refusal of the police request, that an arrest for an otherwise lawful demonstration may be made. As so interpreted we believe the ordinance is not so overly broad in scope as to be unconstitutionally vague or that it delegates undue discretion to the police. This is the type of conduct with which we are here faced and which is prohibited by the ordinance." (*Id.* at 60.)

As construed by the Illinois Supreme Court, no conviction under the ordinance is warranted unless all of the above-cited elements occur together. In addition, the Court was careful to interpret the ordinance so that it could not be used to enforce the "heckler's veto" as the petitioners contend.

In *Chicago* v. *Joyce,* 38 Ill. 2d 368, 232 N. E. 2d 289 (1967), the Illinois Supreme Court upheld a conviction of disorderly conduct over a challenge that the ordinance was unconstitutionally vague. The defendant and thirty-five other people sat on the sidewalk outside City Hall, completely blocking the entrance to the building and preventing the use of the sidewalk by passers-by. Three or four times the police requested them to leave. Instead of complying they began singing loudly and were arrested. The Court held that their conduct was not protected by the First Amendment and the constitutional challenge to the ordinance was without merit.

The petitioners rely heavily on *Landry* v. *Daley,* 280 F. Supp. 968 (N. D. Ill. 1968). That opinion is irrelevant to this Court's consideration of the challenge to the disorderly conduct ordinance. However, because the petitioners place great emphasis on it, a brief discussion and analysis of that opinion is warranted.

The District Court in *Landry* proceeded on the assumption that the constitutionality of a State law may be tested by scrutinizing the wording of the law and hypothesizing as to all possible abusive ways that the law could be ap-

plied. Though the Illinois Supreme Court had considered constitutional challenges to the ordinance, the District Court ignored the interpretation placed on the ordinance by the State's highest court. This was fundamental error. *Winters* v. *New York,* 333 U. S. 507 (1947). It is not the possible misapplication but the actual scope and application given by a law by the State court's interpretation that is the test of its constitutionality.

Because of the nature of the offense involved, disorderly conduct is difficult to define with precision. A great variety of conduct and many different factual situations fall within the scope of disorderly conduct. To enumerate them all would be impossible. However, this does not mean that the States should be deprived of a type of legislation that is most effective in implementing the police power. In *United States* v. *Petrillo,* 332 U. S. 1 (1947), this Court recognized the difficulties encountered by legislatures in attempting to define prohibited conduct with precision:

> " . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." (*Id.* at 7-8.)

The type of conduct prohibited and the terms "disorderly conduct" and "breach of the peace" have a common meaning and are understood with greater precision than the most carefully drafted legislation could hope to accomplish. As this Court held in *Winters* v. *New York,*

333 U. S. 507 (1947), a defendant is as chargeable with knowledge of a court's subsequent interpretation, as he is with knowledge of the existence of the law interpreted. In *Chicago* v. *Hunt*, 374 Ill. 234, 29 N. E. 2d 86 (1940), the Illinois Supreme Court upheld the constitutionality of the City of Chicago's Disorderly Conduct Ordinance against a charge of vagueness:

> "We laid down the rule to which we now adhere that if the legislative body uses words having a common law meaning or a meaning made definite by statutory definition or previous judicial construction, it may strike directly at the evil intended to be curbed, leaving it to the pleader to state facts bringing the case within the statutory definition and to the judicial department of government to interpret the application of the act to the facts stated." (*Id.* at 236.)

In *Terminiello* v. *Chicago*, 337 U. S. 1 (1949), this Court reversed a conviction under the disorderly conduct ordinance because the trial judge had given it an unconstitutional interpretation in his charge to the jury. As the dissent in *Terminiello* points out the issue of the validity of the jury instruction had not been raised in any of the State Courts, it had not been included in the petition for certiorari, nor had it been briefed or argued before this Court. Thus, the Illinois Courts cannot be charged with condoning the unconstitutional interpretation given by the trial judge. The majority opinion in *Terminello* is void of any implication that the ordinance itself was invalid or was not susceptible of a constitutional interpretation by the Illinois courts when the issue of its validity was properly raised before them.

The petitioners claim that this ordinance is similar to those ruled invalid in *Cox* v. *Louisiana*, 379 U. S. 536 (1965); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963) and *Wright* v. *Georgia*, 373 U. S. 284 (1963). In *Cox* v. *Louisiana, supra*, the Louisiana Supreme Court defined the

term "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet," 244 La. at 1105, 156 So. 2d at 455. The Court found that interpretation unconstitutional because it was likely to allow conviction for innocent speech. 379 U. S. at 552. In *Edwards* v. *South Carolina, supra,* this Court found that the State Court's definition of "breach of the peace" was vague. In part the South Carolina Supreme Court defined it thus:

> "By 'peace' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society." *State* v. *Edwards,* 239 S. C. 339, at 343-344, 123 S. E. 2d 247 (1961), at 249.

In *Wright* v. *Georgia,* 373 U. S. 284 (1963), the defendants were convicted of disorderly conduct for playing ball in a public park at a time which police said was reserved for younger children. But it was undisputed that no such rules were posted in the park, nor were they a part of the disorderly conduct ordinance. The existence of such rules for the use of the park could not be proved. This Court said:

> "Under any view of the facts alleged to constitute the violation it cannot be maintained that petitioners had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process. *Lanzetta* v. *New Jersey,* 306 U. S. 451; *Connally* v. *General Construction Co.,* 269 U. S. 385; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; See also *United States* v. *National Dairy Products Corp.,* 372 U. S. 29." (*Id.* at 293).

None of these cases is remotely analogous to the present case. The Illinois Supreme Court has defined the City of Chicago's disorderly conduct ordinance to warrant a conviction for breach of the peace only when:

1. There is an imminent threat of violence;
2. the police have made all reasonable efforts to protect the demonstrators;
3. the police have requested that the demonstration be stopped;
4. the police have explained the request if there is time; and
5. the request has been refused.

All of these elements must be present to warrant an arrest. In addition, the Illinois Supreme Court has declared that the ordinance shall not be used to stop a peaceful demonstration merely because of the reaction of a hostile crowd. Though the precise conduct involved in a breach of the peace may be difficult to describe (and some courts have attempted and failed to do so) the Illinois Supreme Court has succeeded by carefully limiting police discretion and the circumstances in which the ordinance may be applied to conduct protected by the First Amendment. For this reason, the ordinance is constitutional.

III.

THERE WAS NO ERROR IN INSTRUCTING THE JURY AS TO THE EXISTENCE OF AN ORDINANCE WHEN THAT INSTRUCTION CLARIFIED TESTIMONY IN THE RECORD AND WAS NOT MISLEADING CONSIDERING THE CHARGE AS A WHOLE.

The petitioners' sole authority for their argument that one of the instructions given the jury constituted reversible error is a footnote from *Cox* v. *Louisiana,* 379 U. S. 536 (1965) at 556. There was no issue in that case relating to the validity of jury instructions. In the part of the opinion which the petitioners rely on this Court was

considering the constitutionality of a statute prohibiting the blocking of public passages. Though on its face it purported to forbid all obstruction of public ways, this Court found that in its application administrative discretion was used to allow some persons to demonstrate on public ways. In the footnote relied on this Court referred to an ordinance which it had discovered by its own research and had been cited by neither of the parties. It had not been mentioned in the State courts and was, of course, not given in the charge to the jury. This Court only referred to the ordinance to refute any possible argument that the ordinance contained standards for the granting of permits which guided officials in their activities and thus that the public passages ordinance was not applied with unfettered administrative discretion. When read in its context the footnote relied on is irrelevant to the petitioners' argument claiming prejudice from the jury instruction in this case.

The instruction on the existence of an ordinance requiring a permit for public assemblies was properly given because it clarified testimony in the record. One of the counts of disorderly conduct with which the petitioners were charged was "collecting in a body for an unlawful purpose." The prosecution introduced evidence that no permit for the demonstration was obtained or applied for as part of the proof of the petitioners' unlawful purpose. The defendants are correct in asserting that it was the purpose of the City to impress the jury that there was some wrongdoing (Appellants' Brief at 29). The failure to obtain or even apply for a permit knowing that one was required clearly tends to show unlawful intent. It was necessary to tender an instruction on the existence of the parade ordinance to clarify the relevance of the testimony for the jury. It was made clear in the other instructions that unlawful intent was an element of one of the charges of disorderly conduct and that the two charges of disorderly conduct were the offenses for which the petitioners were

tried. The existence of the parade ordinance was relevant to the proof of the prosecution's case giving the prosecutor a right to an instruction concerning it and thus, it was in no way erroneous to include that instruction in the charge to the jury.

The Illinois Supreme Court considered the issue of prejudiciality and found that the instruction was not misleading and that there was no prejudice to the petitioners. There is ample authority in Illinois law to support that Court's determination though its decision alone would be sufficient on a point of State procedure to warrant this Court's adhering to the Illinois decision. See *Kosowski* v. *McDonald Elevator Co.*, 33 Ill. App. 2d 386, 179 N. E. 2d 469 (1962); *Dickerson* v. *Baltimore & O. C. T. R.*, 73 Ill. App. 2d 5, 220 N. E. 2d 43 (1966).

Petitioners' sole authority does not support their argument. The instruction was proper. The Illinois Supreme Court was correct in concluding that giving the instruction to the jury did not prejudice petitioners.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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